BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of SBC Communications,	)	
Inc. Pursuant to Section 271 of the	)	
Telecommunications Act of 1996 to	)	CC Docket No. 97-121
Provide In-Region, InterLATA	)	
Services in Oklahoma	)	

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

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EXECUTIVE SUMMARY

MCI Telecommunications Corporation ("MCI") opposes the application of SBC Communications, Inc., and its subsidiaries Southwestern Bell Telephone Company and Southwestern Bell Long Distance (collectively "SWBT") to provide originating interLATA services in Oklahoma pursuant to section 271 of the Communications Act, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act" or "Act"). SWBT's application should be denied because it has not met the statutory requirements for providing in-region long-distance service: SWBT has not entered into an approved agreement with a competitor providing predominantly facilities-based service to residential and business customers that fully implements each of the items on the competitive checklist; SWBT has not met the separate affiliate requirements of section 272 of the Act; and SWBT's entry into the long-distance market in Oklahoma would be contrary to the public interest.

1. SWBT has not entered into an approved agreement with a competitor providing predominantly facilities-based service to residential and business customers that "fully implemented" each of the items on the competitive checklist, as section 271 expressly requires. SWBT nevertheless argues that its entry into the long-distance market is required because it has "offered" or "made available" the items on the competitive checklist in an agreement with Brooks Fiber Communications and in a Statement of Generally Available Terms and Conditions ("SGAT"). *See, e.g.,* Brief in Support of Application by SBC Communications Inc., et al., for

Provision of In-Region, InterLATA Services In Oklahoma (filed April 11, 1997) ("SWBT Br."), at 12-17. This is a transparent attempt to avoid the explicit requirements of the Act.

"Track A" of section 271 (§ 271(c)(1)(A)) requires a Bell Operating Company ("BOC") to show more than that it has entered into a contract reciting the competitive checklist. The BOC must demonstrate actual competition through working interconnection agreements that "fully implement[]" all of the checklist items. §§ 271(d)(3)(A), 271(c)(1)(A). SWBT must therefore establish, among other things, that services have been provided in a timely and nondiscriminatory manner, in volumes adequate to satisfy the commercial needs of customers, and of a quality equal to that which SWBT provides itself.

SWBT does not even claim to be commercially providing, let alone fully implementing, all 14 checklist requirements. Indeed, SWBT's filing is little more than a list of *promises* to provide checklist items sometime in the future, using systems and methods not yet developed. For example, SWBT promises to provide state-of-the-art operations support systems ("OSS"), SWBT Br. 24-28, but at this time its OSS is largely untested and has not been commercially used by competitors. As a result, the Commission can only speculate whether competing providers can order service and unbundled elements on a reliable, nondiscriminatory basis. Similarly, there is not a shred of evidence that SWBT has even begun to implement -- let alone fully implemented -- numerous checklist requirements such as access to unbundled switching, Advanced Intelligent Network databases, or combinations of unbundled elements. There is no evidence of technical specifications, tests, trials, or commercial use of these complex systems.

SWBT's application is also premature because cost-based prices have not been established for network elements as required by the Act. Indeed, SWBT has reserved its right to challenge the basic notion of determining costs in Oklahoma using "TELRIC" methodology -- and has already challenged in federal court in Texas the legality of basing rates on TELRIC -- leaving uncertainty not only as to the level of final prices, but also as to whether TELRIC methodology will ultimately be used to establish prices. In the meantime, the interim rates established in Oklahoma are far higher than forward-looking cost-based rates required for compliance with the Act, and higher even than the interim proxy rates established by the Commission.

Unable to satisfy Track A, SWBT falls back on Track B (§ 271(c)(1)(B)). But SWBT cannot comply with the Act by relying on what is essentially a tariff. Track B allows for compliance via an SGAT only in the exceptional circumstance where competing providers refuse to request access at all. But as SWBT admits, several agreements with competing providers had already been *approved* by the OCC before January 11, 1997 (*i.e.*, three months prior to SWBT's application, the relevant date under Track B). SWBT Br. 4-5 & nn.3-4. Thus, compliance by means of an SGAT is not available to SWBT as a matter of law.[1]

2. SWBT has failed to demonstrate that it will comply with the separation and nondiscrimination requirements of section 272. Instead of providing information explaining how

[1] Track B is also available if the state commission issues a finding that competing providers refused to negotiate in good faith, or failed to comply with the implementation schedule in the applicable interconnection agreement. There has been no such finding -- and no such allegation by SWBT -- in Oklahoma.

it will comply, it merely repeats the language of the statute and the Commission's implementing regulations. These boilerplate statements are insufficient to demonstrate compliance with section 272.

3. SWBT's application is also premature because its local bottleneck is firmly in place. Congress understood that it is not in the public interest for a BOC to enter the in-region long-distance market until there is effective local competition. Operations of a few new entrants who serve only a handful of customers in two Oklahoma cities do not impose any effective marketplace constraint on SWBT's exercise of its continuing monopoly power. Moreover, the lack of any serious competitive presence permits SWBT to continue to charge long-distance providers access charges that are many multiples of SWBT's cost. These inflated access charges fund what amounts to a war chest -- derived from its bottleneck power -- that SWBT now wishes to use to compete unfairly in long distance while solidifying its monopoly stranglehold over local customers.

For these and other reasons discussed below, SWBT's premature entry into the long-distance market would damage the existing robust competition in the interexchange market. At least equally important, its premature entry would shatter the fragile prospects for local competition. Congress plainly intended the prospect of long-distance entry to be an incentive to the BOCs to eliminate their stranglehold on the local market. Take that away, and SWBT will lose the only business incentive it has to cooperate with competitive local exchange carriers ("CLECs") to open the local market to competition.

As a competing local exchange provider that has already invested more than $1 billion in local exchange facilities nationwide, and that will invest an additional $700 million by year end, *see* Affidavit of David Agatston, ¶ 4 (ex. A hereto), MCI has a vital interest in ensuring that local markets are opened to competition in practice -- not simply on paper. In March, 1996, MCI notified SWBT that MCI wished to obtain access and interconnection throughout SWBT's region. In 1996 and continuing through MCI's recent negotiations with SWBT in Texas and Missouri, MCI requested that any final agreement with SWBT be used as a basis for negotiation of agreements in other states. Agatston Aff. ¶ 5. SWBT, however, has resisted this approach. Because of SWBT's recalcitrance, MCI was forced to demand negotiations for Oklahoma, Kansas and Arkansas, which apparently will have to proceed from scratch. *See* Agatston Aff. ¶ 5.

MCI plans to become a facilities-based provider in Oklahoma in the second half of 1998. Agatston Aff. ¶ 4. Accordingly, as a potential competitor to SWBT in the local market, MCI has a significant interest in the status of SWBT's compliance with the competitive checklist. Moreover, MCI has an important interest in the resolution of the issues of statutory construction raised by SWBT's premature application. If SWBT's filing is not dismissed as facially deficient, it will allow the Commission to establish critical precedent to govern the BOCs' proper implementation of the Act.

For these reasons, SWBT's application should be denied.

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ARGUMENT

I. SOUTHWESTERN BELL'S APPLICATION FAILS TO SATISFY THE THRESHOLD REQUIREMENTS OF § 271.

Section 271 imposes the burden of proof squarely on SWBT. The FCC must deny the application unless SWBT has proven that all the conditions of section 271 are satisfied. The pivotal language of subsection (d)(3) -- "The Commission shall not approve the authorization requested . . . unless it finds . . ." -- unequivocally directs the Commission to deny the application when it is unable to make the affirmative findings detailed in subparagraphs (d)(3)(A)-(C).

A. SWBT Must Show that It Has Provided and Fully Implemented Each of the Checklist Items.

The Act makes actual competition the precondition to BOC in-region long-distance entry. Specifically, section 271(c)(1)(A), known as "Track A," requires that

(1) the BOC enter into one or more agreements approved under § 252 with a competing carrier;

(2) the competitor actually provide service to both residential and business customers; and

(3) the competitor provide such service exclusively or predominantly over its own facilities.

Additionally, a BOC proceeding under Track A must actually be "providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A)." § 271(c)(2)(A)(i)(I). In order to ensure competition in the local market prior to BOC in-region entry into the long-distance market, Congress further required that the access or interconnection

"provided" by the BOC must include each of fourteen checklist items. § 271(c)(2)(B). Finally, emphasizing the importance of actual operations implementing the competitive checklist, Congress explicitly required that a BOC prove that it has "fully implemented the competitive checklist" in order to gain entry into the in-region interLATA market. § 271(d)(3)(A)(i). These requirements share one common feature: Congress mandated real competitors and real competition, and not anything less, as a pre-condition for in-region entry.

The Conference Report confirms that Congress meant what it said when it required full implementation of the checklist:

> The requirement that the BOC is "providing access and interconnection" means that the competitor has implemented the agreement *and the competitor is operational*. This requirement is important because it will assist . . . in the explicit factual determination by the Commission under new section 271(d)(2)(B) that the requesting BOC has *fully implemented* the interconnection agreement elements set out in the "checklist" under new section 271(c)(2).

H.R. Conf. Rep. No. 104-458, at 148 (1996) (emphasis added).

The requirement that the checklist items be "fully implemented" through working interconnections assures that, at a minimum, the technological preconditions to local competition are operational before the BOCs may compete in downstream markets. Congress did not wish to leave it to conjecture whether the offerings in a tariff or a contract would actually work as advertised. It understood that many of the processes and technology for interconnection and unbundling are new and complex. This is particularly so for the many OSS functions and interfaces that need to be operational on a commercial scale before a competitor can offer retail services to customers with any assurance that it will be able to provide and maintain the quality

of service it promises in a timely and reliable manner. *See* Affidavit of Samuel L. King, ¶¶ 25-30 (ex. B hereto). These new interconnection and unbundling agreements are unlike contracts to deliver well-known and understood goods and services, where through a course of dealings or historical usage all of the parties know what a contractually specified item is, how it works, and what kinds of performance can reasonably be expected. Agatston Aff. ¶ 9. Here, in contrast, there are few benchmarks, definitions and understandings except those specified in the agreements. And it is inevitable that problems and disputes will arise in translating those paper commitments into actual performance. This concern is particularly acute because the BOC has virtually all of the bargaining power, and no incentive to cooperate with its would-be competitors.

Congress legislated a very practical solution to this problem. Rather than simply requiring BOCs to reach interconnection agreements to open up their monopoly markets, Congress ultimately decided to require, as a threshold matter, proof that those contractual arrangements actually worked. SWBT's insistence that it has complied with the Act flouts this legislative judgment, because SWBT does not even claim that it has operational systems implementing the competitive checklist. SWBT instead proposes a legal theory that would effectively eliminate these core statutory requirements. SWBT asserts that it can enter the long-distance market in Oklahoma based on a mere *offer* of each of the checklist items. But this claim is flatly inconsistent with the Act's requirement that BOC in-region long-distance entry come after, and not before, full implementation of the checklist with operational facilities-based competitors.

B. SWBT Has Not Fully Implemented the Competitive Checklist.

SWBT has not come forward with evidence of working interconnections implementing the checklist. MCI identifies below numerous checklist requirements SWBT has not implemented. Moreover, even if SWBT had already implemented its promises in its SGAT and agreements (which it is not close to doing), many of these promises fall short of the requirements of the Act.

1. *OSS.* SWBT's deficient OSS fails to satisfy the requirements of the checklist. Smoothly functioning support systems are essential for a CLEC to enable its customers to order service, obtain maintenance and repairs, and receive billing information in a timely, accurate and effective fashion. The Commission has previously explained that "providing nondiscriminatory access to these support system functions . . . is vital to creating opportunities for meaningful competition." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499, ¶ 518 (1996) ("*Local Competition Order*"). As a result, the Commission has determined that OSS is a network element that must be unbundled under just, reasonable, and nondiscriminatory terms; OSS is critical to the reasonable, just, and nondiscriminatory provision of other unbundled elements. *Local Competition Order*, ¶¶ 517, 523, 525.

SWBT's OSS interfaces and associated business processes are neither facially adequate nor operational. Consequently, SWBT is not currently providing, or able to provide, unbundled network elements and resale in a timely, reliable, and nondiscriminatory fashion. These defects

are explained in detail in the accompanying affidavit of Samuel L. King, and are highlighted below:

(a) *Use of manual intervention.* Many checklist items, such as unbundled switching, unbundled transport, and resale, can be ordered only by fax or telephone for most business orders, with SWBT's representative then re-entering the request into SWBT's computers. *See* King Aff. ¶¶ 32, 50-51, 53. A new entrant cannot compete against an entrenched incumbent if it is forced to resort to such manual access arrangements. Manual intervention causes delay, introduces errors, and cannot handle orders on a commercially significant scale. King Aff. ¶¶ 52-53. By relying upon manual intervention, the BOC can hold its competitors hostage to its own response time, hours of operation and ability (or incentive) to provide accurate information. King Aff. ¶ 15. Also, manual arrangements increase CLECs' costs. *Id.*

(b) *Standardized interfaces.* OSS interfaces must be uniform. The time and capital investment required for CLECs to develop non-standard OSS interfaces represent an insuperable barrier to entry. While SWBT touts its commitment to several standardized interfaces, this commitment is not as overarching as SWBT suggests. For example, SWBT has not deployed or committed to deploy industry standard Feature Identification Codes for ordering, or Carrier Access Billing System Billing Output System ("CABS BOS") format for billing CLECs for resold services. King Aff. ¶ 33. It is critical that SWBT deploy these interfaces not just because they will be standard, but also because these interfaces often provide important functionalities that do not exist in SWBT's present systems. The CABS BOS format for billing, for example, provides information necessary for MCI to audit its bills, information which is not available in SWBT's Customer Records Information System ("CRIS") format. *See* King Aff. ¶¶ 74-75.

Notably, SWBT's merged affiliate, PacBell, has agreed to provide CABS BOS format for billing. King Aff. ¶ 74.

(c) *Failure to provide demonstrably functioning systems.* Even where SWBT claims that it has made available appropriate electronic interfaces that meet industry standards, those interfaces have not been shown to work in practice. The only experience SWBT has with any of its OSS interfaces is in the very different contexts of provision of service to its own retail customers and in the access arena. King Aff. ¶¶ 44-47, 58-61, 68-71, 77. Even this experience does not include many of the standardized interfaces touted by SWBT, and does not include the only interfaces offered by SWBT to perform important functions such as the ordering of unbundled elements. King Aff. ¶¶ 34, 58-61. Remarkably, SWBT proclaims its interfaces to be fully operational even while acknowledging that "[t]o date, *no* CLECs are using, on a 'live' basis, any of the electronic interfaces SWBT makes available for pre-ordering, ordering/provisioning, maintenance/repair, and billing." Ham Aff. ¶ 45 (SWBT Appendix I, Tab 7). Indeed, SWBT does not even claim that it has successfully *tested* the vast majority of its electronic interfaces with any CLEC. SWBT has rebuffed MCI's own attempts to test SWBT's OSS systems in Missouri and Texas until MCI has a signed interconnection agreement with SWBT and is certified in each state. King Aff. ¶ 35.

SWBT itself emphasizes that interfaces such as "EDI ordering processes are a new development to support an extremely complex task. Implementation of [these] interface[s] depends on the mutual efforts of CLECs and SWBT." Ham Aff. ¶ 29. That implementation of these interfaces depends on future efforts itself shows that they are not yet fully implemented, as

the Act requires. It is almost inevitable that there will be some significant implementation problems when these systems are first put in place. This is confirmed in the most dramatic way by the myriad problems faced by MCI and other CLECs after electronic interfaces were introduced by other BOCs in both the local and interexchange arenas. King Aff. ¶¶ 29, 61.

SWBT has not provided sufficient evidence to allow the Commission to make the "explicit factual determination" envisioned by Congress about whether these technical prerequisites to local competition "are operational." H.R. Conf. Rep. No. 104-458, at 148. SWBT would have the Commission rely instead on vague descriptions of its OSS coupled with "demonstrations" that do not amount even to testing, and on testing that has not even begun. Ham Aff. ¶ 29. SWBT's incentive to solve inevitable implementation problems and ensure quality, nondiscriminatory systems should not be removed by allowing it immediate entry into the long-distance market.

2. *Pricing.* SWBT's proposed entry into the long-distance market is also premature because unbundled network elements are not priced at cost-based rates, as required under section 271(c)(2)(B). Indeed, these items are not even available at fixed prices, let alone fixed cost-based prices. The prices set forth in SWBT's arbitrated agreements and its SGAT are temporary prices subject to a retrospective correction when the OCC undertakes a permanent price docket at some future, but as yet undetermined, date. The OCC has indicated that it intends to schedule such a hearing only after the issues currently before the Eighth Circuit are resolved. The "prices" available to new entrants therefore are hardly prices at all, but are the equivalent of requiring new entrants to post a bond until actual prices are known. The uncertainty as to

permanent rates significantly raises the cost of any investment undertaken in the interim, because it increases the risk that CLECs will not be able to recover their interim investments.

Furthermore, there is no basis for regarding these interim prices as cost-based. The OCC merely adopted the Arbitrator's recommendation to use SWBT's proposed rates temporarily -- not because they related appropriately to the cost of providing these services, but because the arbitrator assumed that SWBT's prices were likely to be higher than cost-based prices: "[I]f a true-up is needed in the future it would be easier to explain to customers rather than trying to explain a lower price being trued-up to a higher price." Rep. and Rec. of Arbitrator, AT&T Arbitration, at 20, and accompanying Order of OCC (SWBT App. III, Tab 9). Moreover, SWBT has explicitly objected to the TELRIC forward-looking cost methodology and is seeking to overturn the Commission's rules.[1] Thus, much of the uncertainty surrounding pricing is of SWBT's own making.

The interim rates are consistently higher than appropriately calculated cost-based rates. For example, the rate for an unbundled switching port is more than double what it should be, and the rates for switching usage are double to triple what they should be, as calculated under the Hatfield Model.[2] Moreover, the interim rates are higher than the proxy ceilings established by

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[1] *See* SWBT Complaint, *SWBT v. MCI et al.*, ¶ 7 (W.D. Tex.; filed Feb. 24, 1997) (challenging Texas PUC's use of TELRIC methodology); *see also* SWBT Br. 22 n.22 (preserving right to object to TELRIC pricing in Oklahoma).

[2] Exhibit C hereto compares rates derived from the Hatfield model with the rates proposed by SWBT that were adopted by the OCC as interim rates. The Hatfield Model, developed by Hatfield Associates, measures the costs that an efficient provider would incur to provide narrowband local telephone service at the current level of demand, assuming that the provider

(continued...)

the FCC in its *Local Competition Order*, App. B -- two to three times higher for some elements. *See* Ex. C hereto. Even SWBT acknowledges that many of the interim rates are based on retail tariffs or pre-Act contract rates rather than forward-looking cost studies of unbundled elements.[3]

3. *Other Checklist Items.* The lack of functioning OSS systems and final cost-based prices infect multiple checklist requirements, but SWBT's application fails to satisfy the competitive checklist in many other ways. The fundamental problem with SWBT's application is that it consists almost entirely of unexecuted plans. SWBT should have set forth, at a minimum, *how* each item has been implemented; what testing, if any, has been performed; what field experience there is with each system (if any); and what volume of traffic each system can handle. SWBT has made no such showing because its application is so premature.

The accompanying affidavit of David Agatston (ex. A hereto) addresses a number of the defects in SWBT's filing on checklist issues. A few of the most glaring examples of SWBT's noncompliance with the checklist are highlighted below:

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[2](...continued)
used modern technology in efficient network configurations and efficient business practices, but kept its wire centers at their current locations. It therefore can be used to determine the forward-looking costs of unbundled network elements in specific geographic areas.

[3] *See* Rep. & Rec. of Arbitrator, *supra*, at 20 (summary of testimony of E. Springfield for SWBT). In addition, the rates for local transport and termination of other carriers' traffic will not be reciprocal in Oklahoma, and therefore do not meet the requirements of sections 252(d)(2)(A) & (b)(5) of the Telecommunications Act as interpreted in the *Local Competition Order*, App. B, § 51.711(a)(3); *id.* ¶¶ 1085-90. Under the rules adopted by the OCC in the AT&T Arbitration, rates for local transport and termination will be determined solely by the facilities used, with no regard to the effect of asymmetric compensation on competition. Rep. & Rec., *supra,* at 20-22. These are also the terms under which SWBT offers local transport and termination of traffic in its SGAT.

a. SWBT has not implemented a single physical collocation. SWBT has not implemented a single physical collocation (SWBT Kaeshoefer Aff. ¶ 25), a critical checklist requirement. Physical collocation is typically the most efficient means for a CLEC to interconnect with a local network. Thus, CLECs such as MCI prefer to order unbundled loops only when physical collocations are in place. Agatston Aff. ¶ 13. SWBT's failure to provide physical collocation therefore means that it has not fully implemented checklist items (i) (interconnection), (ii) (unbundled elements) or (iv) (unbundled loops).

b. SWBT has not presented evidence that it has effectively provided unbundled loops to CLECS pursuant to approved interconnection agreements. There is no evidence that SWBT can reliably provide commercially significant volumes of loops to CLECs in order to satisfy checklist item (iv). SWBT does not even claim that it has provided a *single* unbundled loop to a CLEC pursuant to an approved interconnection agreement. Although SWBT apparently claims that Brooks is using loops provided by SWBT, SWBT Br. 11-12, MCI understands that Brooks is using circuits leased from SWBT pursuant to a special access tariff. Agatston Aff. ¶ 23. There is no evidence that SWBT has provisioned a single loop -- let alone in any significant quantity to assess the quality of SWBT's systems -- pursuant to any approved interconnection agreements. Moreover, SWBT's agreement with Brooks is facially inadequate as it promises, at best, a five-day delay for loop provision. To meet the parity requirements of the Act, SWBT should provide loops in one or two days, similar to the time it takes a BOC to provide a second line to a customer. Agatston Aff. ¶ 24. Because local loops are essential facilities that are exceedingly difficult and expensive to duplicate on a large scale, the presence

of reliable systems for ordering and provisioning loops is critical to the ability of CLECs to compete against the incumbents.

c. SWBT has not provided CLECs with unbundled switching or combinations of unbundled elements. SWBT has not provided unbundled switching (checklist items (ii) and (vi)) to any CLEC. *See* SWBT Butler Aff. ¶ 7. Providing unbundled switching is a good example of a technology with which BOCs have no prior experience, and SWBT does not purport to explain in its application any engineering development it has undertaken to provide this checklist item. Detailed technical specifications and testing are needed to determine the adequacy of SWBT's offering, and to allow CLECs to develop systems to interface with SWBT's unbundled switching. That there is no evidence of SWBT having even prepared technical specifications for unbundled switching speaks volumes as to its present inability to meet the competitive checklist.

Similarly, SWBT does not claim it is currently providing combinations of unbundled elements to any CLEC (checklist item (ii)). As with unbundled switching, there is not yet a standard industry practice for ordering and providing combinations of unbundled elements. It is therefore critical that the requirements for combinations of elements be set out in detail. Agatston Aff. ¶¶ 20-21.

The ability to purchase combinations of unbundled elements is important to CLECs. As noted above, many types of unbundled elements cannot be used without collocations in place. An exception to this, however, is that CLECs can combine certain elements -- local transport, multiplexing, and unbundled loops -- to *substitute* for collocation, thus avoiding significant

expenses. Agatston Aff. ¶ 22. There is no evidence that SWBT has provided, or is even capable of providing, this or any other combination of unbundled elements in order to fully implement checklist item (ii).[4]

d. SWBT has not provided sufficient access to its directory assistance databases.

The Act requires that ILECs provide dialing parity, which is defined to include access to directory listings. § 251(b)(3). The Commission's implementing regulations explicitly require ILECs to provide access to directory listings in "readily accessible magnetic tape or electronic formats." 47 C.F.R. § 51.217(c)(3)(ii). SWBT, however, will provide access to its directory assistance databases only on a "read-only" basis. SWBT Keener Aff. ¶ 6. That type of limited access does not allow a CLEC to download the database in order to create and populate its own database. Agatston Aff. ¶ 32. SWBT's failure to fully implement this requirement (part of checklist items (ii) and (xii)) will result in inferior service, dialing delays, and unnecessary, excessive costs, and will restrict the CLECs' ability to develop new and enhanced services. Agatston Aff. ¶ 33.

e. SWBT has not provided access to call-related databases and signaling links.

There is no evidence that SWBT has come anywhere close to fully implementing checklist item

[4] In addition, before the CLEC can purchase unbundled network elements, SWBT has insisted that CLECs obtain licenses from the multiple third-party vendors who have supplied equipment or software to SWBT. If this requirement is upheld and CLECs are forced to obtain these licenses, it will greatly hamper their ability to enter local markets, and in some cases render them unable to purchase network elements at all. MCI's Petition for a Declaratory Ruling concerning this issue is currently pending before the Commission (CC Docket No. 96-98, filed March 11, 1997).

(x): SWBT has not provided SS7 or access to 800/888, line information, or AIN databases. SWBT's reliance on paper promises as proof of supposed implementation (SWBT Deere Aff. ¶¶ 87-109) is all the more troubling when complex systems such as AIN are involved. The systems required for compliance with checklist item (x) involve numerous operational details that SWBT simply assumes it will resolve after it enters the interexchange business in Oklahoma. Agatston Aff. ¶ 30; *see also* Affidavit of Dale N. Hatfield at 9-14 (ex. D hereto) (discussing SS7 and intelligent networks).

f. SWBT has not effectively managed NXX resources necessary for CLEC competition. In the 405 area code in Oklahoma, there is already a shortage of numbers to assign to potential competitors. SWBT Adair Aff. ¶ 16 (noting 405 area code "jeopardy"); Agatston Aff. ¶ 28. It is SWBT's responsibility as NXX administrator to anticipate such jeopardy situations and implement code relief in a timely manner to avoid numbering shortages. Agatston Aff. ¶ 28. Numbering shortages have a far greater impact on would-be competitors than on incumbent providers, as incumbents already have NXX codes covering their territory. Agatston Aff. ¶ 29.[5] Without access to NXX's, CLECs are entirely shut out from competing for any customers until a new area code is provided, which may take more than a year to accomplish.

[5] Thus, the Commission emphasized in its *Second Report and Order,* ¶ 332 (Aug. 8, 1996) that incumbent LECs "have control over CO codes, a crucial resource for any competitor attempting to enter the telecommunications market." The Commission further stated that "incumbent LEC attempts to delay or deny CO code assignments for competing providers of telephone exchange service would violate section 251(b)(3), where applicable, section 202(a), and the Commission's numbering administration guidelines . . ." *Id.* ¶ 334.

Agatston Aff. ¶ 29. SWBT has not shown that it has implemented checklist item (ix) by effectively managing NXX resources to permit a fair opportunity for CLEC competition.

Moreover, SWBT has not shown that any predominantly facilities-based carrier is providing service to residential subscribers, as required by section 271(c)(1)(A). SWBT claims that a single provider, Brooks, is providing residential service, but Brooks -- which should be in the best position to know what services it is providing -- states that it has not done so.[6] And SWBT does not even claim that Brooks is providing residential service predominantly over its own facilities. For all these reasons, SWBT has failed to meet the requirements of Track A.[7]

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[6] Comments of Brooks Fiber Properties, Inc. In Support of ALTS Motion to Dismiss and Request for Sanctions, CC Docket No. 97-121 (April 28, 1997). In any event, even when a predominantly facilities-based CLEC begins to provide service to residential customers, a handful of residential customers would not be sufficient to satisfy Track A. The fundamental purposes of the Act -- to permit in-region BOC entry only when the BOCs face meaningful competition, and to promote such competition against the BOCs -- would be thwarted if a BOC could satisfy Track A when a competing provider has targeted only a narrow customer group or geographic area, or serves only a handful of subscribers. The key is whether sufficient customers -- both residential and business -- are taking advantage of existing competitive alternatives to demonstrate that the bottleneck is broken.

[7] Finally, because it is so clear that all 14 checklist items are not yet being provided, it is unnecessary to reach the question whether Brooks is "predominantly" facilities based. It is important to note, however, that the requirement for "predominantly" facilities-based providers does not simply mean providers who are not exclusively resellers, as SWBT claims. SWBT Br. 12. If Congress had intended only to require providers who were not exclusively resellers, it would have used that language. Instead, it required predominantly facilities-based carriers, which should be interpreted consistent with its ordinary definition to mean "majority" or "most"; *i.e.*, Track A requires a carrier who is not forced to rely on the BOC for most of the facilities used to provide telephone exchange service. If a competitor must rely on the BOC for most of the facilities, the BOC retains the ability to stymie interexchange and local competition.

(continued...)

C. SWBT Cannot Proceed Under Track B.

Fully aware that it cannot meet the requirements of Track A, SWBT proposes that it be allowed to enter the long-distance market under Track B, through the paper promises of an SGAT. If accepted, this proposal would undermine the entire legislative design of the Act. Track B is a limited exception to the normal entry requirements of Track A; it enables a BOC to apply for long-distance entry based on an SGAT, without full implementation of the checklist. Track B is available only in narrow circumstances because it provides less assurance of the openness of the local market than does Track A, and is more subject to post-approval obstruction by the BOC through technical disputes, implementation problems, and delays.[8]

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[7](...continued)

The more substantial question is how to determine whether a new entrant is using more or less than half of its own facilities to provide local telephone service. Several measures are relevant to the degree of a new entrant's dependence on the BOC. One is whether a predominant share of the new entrant's costs involve its own facilities. Also pertinent is the importance of the facilities or services that the CLEC provides for itself. For example, it is critical for a CLEC to own its own switches and related databases because they contain the intelligence of the network and determine the new entrant's ability to provide value-added services to distinguish itself from the BOC. A third consideration, which is not by itself dispositive, is whether the new entrant serves a predominant number of subscribers using its own facilities. Neither the text of subparagraph (c)(1)(A) nor the legislative history directs the Commission to employ any one or combination of these measurements. The critical point is that the new entrant's predominant use of its own facilities makes it effectively independent of the BOC and enables it to define its own services and control its own costs.

[8] Even where Track B applies, however, it requires a BOC to be ready, willing, and able to provide all the checklist items, including the ability to support any request at an operational level. Otherwise, a BOC could fulfill the requirements of § 271 simply by *proclaiming* that it was offering each of the checklist items. Moreover, whether it proceeds under Track A or Track B, SWBT must satisfy the independent public interest test. It would not be in the public interest, for example, for SWBT to provide in-region interexchange services while its control of local bottleneck facilities still gives it the ability and incentive to stifle interexchange competition.

As SWBT recognizes, *see* SWBT Br. 13, Congress adopted Track B because it was concerned that potential competitors might "game" Track A by collectively deciding *not* to compete with a BOC for local business, in an effort to keep the BOC out of the long-distance market. To foreclose such a strategy, Congress determined that a BOC could apply for long-distance entry based on an approved SGAT if "no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1)." § 271(c)(1)(B).

The language "no such provider" refers to potential competitors. Specifically, it refers back to the phrase "unaffiliated competing providers" in the first sentence of § 271(c)(1)(A). Indeed, the second sentence in § 271(c)(1)(A) refers to these providers as "*such* competing providers" (emphasis added). This reference to "such competing providers" is simply repeated when the first sentence of Track B, § 271(c)(1)(B), again refers to "such provider[s]."

As a result, Track B is available only if no "unaffiliated competing providers of telephone exchange service" have "requested the access and interconnection described in subparagraph (A)" in the relevant time period. This exception could not be more simple, or more simply stated: If not a single potential competitor requests an interconnection agreement, then the BOC may proceed under Track B. Reinforcing the conclusion that Track B is aimed at specific CLEC action that results effectively in a refusal to request interconnection, section 271(c)(1)(B) also allows BOCs to rely on Track B if competitors negotiate in bad faith or unduly delay implementation of their agreements.

In Oklahoma, SWBT has not alleged that any of these three conditions exists. It is undisputed that several competitors requested access and interconnection more than three months before SWBT's application (*see* p. iii above, and SWBT Appendix III, Tab 4), and there is no claim that *any* such provider -- let alone *all* such providers -- negotiated in bad faith or failed to comply with implementation schedules in their interconnection agreements. As a result, Track B is unavailable to SWBT.

SWBT nevertheless insists that Track B is available whenever Track A is not satisfied. SWBT Br. 14-15. If accepted, this interpretation would convert a narrow exception to entry into the normal route of entry for BOCs who apply prematurely, and would undermine the safeguards Congress built into Track A. Congress could have stated that Track B is available if "*subparagraph (A) is not satisfied* before the date which is 3 months before the date the company makes its application under subsection (d)(1)." That is not how the statute was written.

SWBT's argument turns on a perverse reading of the word "such" in § 271(c)(1)(B). SWBT asserts that the language "no such provider" means a competitor that satisfies *all* the requirements of subparagraph (A), and thus that SWBT can proceed under Track B as long as no predominantly facilities-based carrier that is providing service to both residential and business customers has submitted a request for an interconnection agreement. *See* SWBT Br. 14. This reading makes a hash out of both the statutory language and the obvious purpose of the Act. As to the language, it could not be more clear: (1) the phrase "no such provider" in paragraph (c)(1)(B), like the phrase "such competing providers" in paragraph (c)(1)(A), refers simply to the

antecedent "unaffiliated competing providers" in (c)(1)(A); and (2) paragraph (c)(1)(B) does *not* say that it applies whenever Track A as a whole is not satisfied in the stated time period.

The crux of SWBT's position is its mistaken presumption that the language "such provider" in § 271(c)(1)(B) incorporates the facilities-based requirements of § 271(c)(1)(A). But § 271(c)(1)(A) expressly states that its requirement that a competitor be providing service exclusively or predominantly over its own facilities applies only "[f]or the purpose of *this* subparagraph" (emphasis added) -- that is, (c)(1)(A), not (c)(1)(B). The predominance requirement therefore cannot be read into subparagraph (c)(1)(B).[9]

As SWBT recognizes, the issue under Track B is whether a provider is "such" a provider at the time it made its request for interconnection. SWBT Br. 14. At that time, the focus must be on whether the new entrant seeks interconnection via an approved agreement so that it will

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[9] At the risk of belaboring the obvious, the language of the statute undermines SWBT's view in still another way. If the language "no such provider" incorporates all of the requirements of § 271(c)(1)(A), the provider that has "requested" access and interconnection would have to be one that is already *receiving* access and interconnection under an approved agreement. Indeed, SWBT itself states that the "requesting" competitor "must actually be 'such provider,'" SWBT Br. 14, confirming that its interpretation leads to this absurd result. It is simply nonsensical to read Track A as the required course only where a facilities-based provider that *already has an interconnection agreement* requests such an agreement.

Faced with the absurd result created by its interpretation of Track B, SWBT may attempt to backtrack and argue that "such provider" incorporates *some*, but not all, of the requirements in Track A. But once the language "such provider" is uprooted from its proper grounding -- "unaffiliated competing provider[]" -- there is no principled basis to incorporate only selected portions of the remainder of Track A into the definition of "such provider." SWBT simply cannot escape the logical consequences of its attempt to expand the definition of "such provider."